No. 2765

United States
Circuit Court of Appeals
Ninth Circuit

AMERICAN NATIONAL BANK, a corporation,
Plaintiff in Error,

vs.

BANK OF BANDON, a corporation,
Defendant in Error.

Brief for Defendant in Error

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FRANK D. MONCKTON, Clerk.

By .....
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BRIEF FOR DEFENDANT IN ERROR

I.

THE FACTS.

For about two years prior to December 15, 1913, the Alfred Johnson Lumber Company had been in the habit of discounting drafts with the Bank of Bandon on the

15th of each month. These drafts were to meet mill pay-rolls, and were drawn on the Robert Dollar Company of San Francisco. The only correspondent of the Bank of Bandon in the latter city was the plaintiff in error. These drafts were always sent to the American National Bank for collection, upon the understanding that, as to any item over $500.00, the latter should wire non-acceptance, in the event that a draft was refused payment. However, the drafts had always been paid previous to the one in controversy.

On the 15th of December, 1913, in accordance with their custom, the Lumber Company drew its draft at sixty days for $6,000.00. The defendant in error credited this sum in regular course, and immediately sent the draft to plaintiff in error.

On the 19th of December, the American National notified the Bank of Bandon that the paper had been accepted by the Dollar Company. This, however, was not the fact. The draft had been refused.

Between the 15th and the 19th of December, the Bank of Bandon had advanced to the Lumber Company the sum of $4,287.78 upon the draft.

The first intimation that the Bank of Bandon had of the non-acceptance was a telegram on December 29th, at which time they had paid out the full amount sued for.

The Lumber Company had on the docks at Bandon a cargo of white cedar, consigned to the Dollar Company. This went on board the vessel from the 21st to the 24th of December, the vessel sailing on the latter date. The value of this cargo was from $10,000.00 to $12,-

000.00. The money advanced upon the draft was for pay-rolls in the manufacture of this cargo, and the draft itself was drawn against it. The cargo was received and sold by the Dollar Company.

The net result was:

1. The Bank of Bandon paid the labor for the production of the cedar, in reliance upon the draft.
2. It lost the only opportunity it had to protect itself by the attachment of this cargo.
3. The drawee received, and got the benefit of this very cargo.

When the draft was refused, the American National did not protest at all. In fact, when they notified the Bank of Bandon on the 29th that the draft was not accepted, they advised the return of the paper without protest. In answer to this, Mr. Topping, attorney for the Bank of Bandon, wired that they had no lien, and asking for advices. The protest for non-acceptance was then made in San Francisco on December 30th. On the same day, the American National wired that the Dollar Company claimed to have no cargo to cover, and that the latter company had thrown the Johnson Company into involuntary bankruptcy, both of which statements appear to have been contrary to the facts. On the 31st, the American National wrote that they expected to suffer the penalty, if it was the cause of the loss. The American National, further, by wire and letter, requested the Bank of Bandon to take all legal steps to protect, but it was too late, as there was nothing to attach after the white cedar had been shipped.

The statement which the Johnson Company had given

to the Bank of Bandon showed that they were solvent, and the Bank of Bandon had no knowledge of any excessive indebtedness to the Dollar Company. It is apparent, therefore, that the Bank of Bandon had the right to expect that the usual custom would be followed, namely, that a pay-roll draft against cargo on the dock would be accepted, and if not, that their correspondent, the plaintiff in error, would promptly notify them, and attend to protest and notice.

Moreover, after the 29th, the attorney for the Bank of Bandon made a full investigation, and could not find any property which would pay for an attachment. The lumber which was on hand would hardly pay freight to San Francisco; the stumpage contracts were actually worth less than the market; and the mill itself was sold under foreclosure for less than the amount of the mortgage which covered it at the time of the transaction in question.

II.

The rulings complained of were based upon the *assumption,* that if defendant in error had attached the white cedar, the Johnson Lumber Company would have been thrown into bankruptcy. This assumption is:

1. Highly speculative.
2. It carries with it the assumption that, if the Bank of Bandon had attached the cedar, the Dollar Company would have instituted bankruptcy proceedings, and thus lost a cargo worth twice the amount of the Bank of Bandon's claim.
3. It leaves to speculation the amount which the

Bank of Bandon would have got out of the cedar even if bankruptcy had followed an attachment.

III.

THE INSOLVENCY OF THE MAKER OF A NEGOTIABLE INSTRUMENT DOES NOT EXCUSE PROMPT PROTEST AND NOTICE.

1. Section 3155 of the Civil Code of the State of California enumerates the cases in which notice of dishonor is excused, and insolvency is not one of them.

2. Sections 3224 to 3228 of the same Code provide that notice of dishonor of a foreign bill of exchange can be given only by notice of its protest. These sections also enumerate the facts excusing protest, of which bankruptcy is not one.

3. It is, of course, elementary, and statutory in California, that protest must be noted on the day of presentment, or the next business day, and that failure to protest exonerates the drawer. The act of the plaintiff in error, therefore, released the Johnson Lumber Company from all liability.

4. We beg to submit the reasoning of the Court of Appeals for the Seventh Circuit, in Phipps v. Harding, 70 Fed. 468, as conclusive of this question:

"We are thus brought to the question whether the known insolvency of the maker at the time of the execution of the note, and the fact that the plaintiffs in error were directors, constituting a majority of the board of

directors, of the maker of the note, obviate the necessity of presentment of the note for payment, and the giving of seasonable notice of dishonor. The contract of the parties was conditional. It was, as we have seen, that if, upon due demand, the note should not be paid by the corporation according to its tenor, they would compensate the holder, or a subsequent indorser who is compelled to pay, provided the requisite proceedings for dishonor were duly taken. That there should be demand of payment and notice of dishonor were terms incorporated into this contract. Rothchild v. Currie, 1 Adol. & E. (N. S.) 43. The reason of the condition imposed by the law, doubtless, was that the indorser might take prompt measures for his security, and the law presumed injury from want of notice of dishonor. This presumption is certainly not refuted by proof of the solvency of the maker evidencing that no injury resulted from want of notice to the indorser. It is said, however, that insolvency known to the indorser dispenses with the necessity of notice, because nothing could be lost by default of demand and notice. We are not prepared to concur in the conclusion of fact. We have said that the insolvency of the maker, when no possible loss could result to the indorser from want of notice, will not excuse failure to advise of dishonor. Certainly, in the case of insolvency notice is more essential, that the party to be charged may take prompt measures for his security. The insolvency of the maker might possibly affect the sufficiency of indemnity, but it would not necessarily result in a total failure of redress. That would be dependent

upon the extent of the insolvency. There have been cases invested with peculiar equities, in which courts have sought to evade this wholesome rule of the common law, and in which they have permitted evidence of no injury to excuse notice. We are not prepared to follow a rule that will tend to confusion in commercial law in order to relieve a supposed hardship. We concur with the Supreme Court of Massachusetts in Farnum v. Fowle, 12 Mass. 89, 92, that the 'hardship, if any, arises from a fluctuation of opinion and an uncertainty as to rules, and seldom from an inflexible adherence to them, because, when it is once known that exactness in the performance of duty is to be required, parties will adapt themselves to such a state of things, and be always diligent and punctual to avail themselves of contracts'. And we concur with Mr. Daniel (Daniel, Neg. Inst., Sec. 1134) that it is 'a total misconception of the obligation of an indorser to place his liability at all upon any question involving the pecuniary circumstances of his principal'. Hardship is more likely to happen from speculation of courts and juries in the determination of the question of fact whether injury has or not resulted from want of notice than from strict adherence to the law and to the terms of the contract. The better opinion is, and, as we think, the settled doctrine of this country is, *that insolvency is no excuse for failure of notice of dishonor.* French's Ex'x v. Bank, 4 Cranch, 141; Wilson v. Senier, 14 Wis. 380; Sanford v. Dillaway, 10 Mass. 52; Far-

num v. Fowle, 12 Mass. 89; Bank v. Ayers, 16 Pick 392; Bank v. Spencer, 6 Metc. (Mass.) 308."

We respectfully submit that the judgment should be affirmed.

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